

RESPONSE OF THE UNITED STATES OF AMERICA TO THE ADDITIONAL QUESTIONS POSED BY THE COMMITTEE AGAINST TORTURE DURING THE FINAL SESSION OF THE PRESENTATION OF THE SECOND PERIODIC REPORT, MAY 8, 2006

1. Does the United States have a list of statutes that broadly prohibit torture? What is the range of penalties for torture?

The federal statutes that specifically style a criminal offense to the elements of torture consist of 18 U.S.C. Section 2340, Section 2340A, and Section 2340B. Under these statutes, whoever “outside the United States commits or attempts to commit torture shall be fined under this title, or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.” Title 18 U.S.C. Section 2340A. The statute creates jurisdiction over acts committed by any national of the United States and any national of any country present in the United States. These sections of the Code were added specifically in response to U.S. ratification of the CAT, when review by the United States government determined that, other than this extraterritorial application, U.S. law was in compliance with the convention.

The maximum punishments for violating these statutes are either 20 years in prison or death. The maximum fine that may be imposed for this type of felony may not exceed \$250,000. 18 U.S.C. Section 3571(a)(b)(3). The maximum jail term and maximum fine may both be imposed upon an offender. Likewise, the court may choose to impose lesser penalties.

Further, acts constituting torture as defined in the Convention may be prosecuted as assault, battery or mayhem (in cases of physical injury); homicide, murder or manslaughter (when a killing results); kidnapping, false imprisonment or abduction (where an unlawful detention is concerned); rape, sodomy, or molestation, or as part of an attempt, conspiracy or a criminal violation of an individual’s civil rights. Punishment for these acts includes prison terms up to life in prison or the death penalty if death of the victim results from the crime.

In addition, conduct that might rise to the level of torture is prosecutable under 18 U.S.C. Section 242. If the conduct results in bodily injury or involves the use, attempted use, or threatened use of fire, explosives, or a dangerous weapon, the penalty range is up to ten years. If the conduct involves kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, the penalty is any term of years or life and, if death results from the acts, the defendant is subject to the death penalty.

Finally, individuals who commit acts that constitute torture, but which are better prosecuted by respective State law enforcement authorities (because they do not meet the jurisdictional requirements of the Federal statutes), may be prosecuted under State laws prohibiting similar acts, to include, for example: murder, aggravated assault, sodomy, rape, etc. Each State’s range of penalties for these crimes will vary depending upon the jurisdiction prosecuting the offender.

See also paragraphs 16 and 44 of the Second Periodic Report.

2. What further action is the Department of Justice taking regarding the Chicago police brutality case?

The Department of Justice will continue to monitor the investigation being conducted by the special prosecutor who was appointed to investigate allegations of systemic torture by the Chicago Police Department in the 1970s and early 1980s.

The Department understands that a state court judge will decide later this week whether and when to release the report of the special prosecutor appointed to investigate torture allegations against former Chicago Police Lieutenant Jon Burge. According to news reports, several police officers have filed briefs opposing the release of Special Prosecutor Edward Egan's report. Cook County Judge Paul Biebel will hear argument on the issue on May 12. The Department will review the report when it becomes public.

3. Does the Prison Litigation Reform Act bar suits by prisoners?

No; prisoners may still pursue private actions. As discussed in the *Second Periodic Report* and in Question 37 of our written responses to the Committee's questions (Q. 37), the PLRA does not limit a prisoner's ability to "complain to and have his case promptly and impartially examined by competent authorities." Section 1997e(e). The PLRA does require, however, that no such actions be brought until "administrative remedies as are available are exhausted." Furthermore, a prisoner alleging actual physical injury may seek compensatory, nominal, and punitive damages, and injunctive and declaratory relief. Prisoners alleging a non-physical constitutional injury may seek nominal and punitive damages, and injunctive and declaratory relief.

4. Do state-run supermax prisons use solitary confinement (in the technical sense of total isolation from other prisoners)?

A 1997 National Institute of Corrections study indicated that more than 30 states operate a unit that can be defined as a "supermax" facility, in which inmates may be confined to their cells for periods of 23-24 hours per day. Those conditions are not necessarily the same as what many might consider to be "solitary" confinement, as during the periods in which the prisoners are confined to their cells, they typically have regular contact with prison staff, visitors, and lawyers.

With respect to the Federal prison system, see our answer to Question 50 in the responses to the Committee's written questions.

5. Does the Detainee Treatment Act prevent prisoners at Guantanamo Bay from suing civilly for redress if tortured, and, if so, does it prevent them from suing even after release?

The Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741 (December 30, 2005) (“DTA”) bars all civil claims brought by aliens detained by the Department of Defense at the Guantanamo Naval Base, except as provided under that Act. Under that Act, a detainee may seek review of their enemy combatant designation (as determined by the Combatant Status Review Tribunal) in the U.S. Court of Appeals for the D.C. Circuit. As part of that review, the D.C. Circuit will consider whether the procedures used by the Combatant Status Review Tribunal followed the standards for those proceedings specified by the order of the Secretary of Defense, as well as whether those standards are consistent with the Constitution or the laws of the United States. In seeking that review, it may be possible for a detainee to claim that the evidence accepted by the tribunal should not have been relied upon because it was adduced by torture.

Beyond the review afforded under the DTA, the DTA bars all other civil claims “against the United States or its agents relating to any aspect of the detention,” if the claims are brought by or on behalf of an alien detained by the military at Guantanamo. If a detainee was determined to be an enemy combatant by the Combatant Status Review Tribunal and if that determination is upheld by the D.C. Circuit, then the DTA’s bar against civil filings regarding “any aspect” of the detention continues after release from military custody. With respect to detainees released from military custody prior to the enactment of the DTA and those released subsequently, but absent a ruling by the D.C. Circuit confirming the validity of the detainee’s enemy combatant status, the DTA appears not to bar civil actions regarding the prior detention. There, of course, would be other legal impediments and defenses that may bar any recovery if such a claim is filed.

6. What is the justification for imprisoning children, even for life without parole?

Juveniles are not generally tried and imprisoned as adults. However, there are certain crimes considered to be so heinous—such as murder or rape—that, even if committed by a youthful offender (usually of a certain age varying from State to State), require an analysis as to whether the offender should be treated as an adult rather than as a juvenile (where the focus would be on rehabilitation and treatment of offender rather than punishment).

Factors typically used in that analysis include:

- The nature of the acts the juvenile offender allegedly committed (e.g., murder, rape, aggravated assault, arson, whether the acts were committed with a deadly weapon, or if the youthful offender had sole responsibility for the act or was a mere follower, etc.);
- The potential for the juvenile offender to be amenable to rehabilitation and treatment and remain in the juvenile system (e.g., the offender’s age at the time of the crimes’ commission, the offender’s prior criminal activity; the offender’s behavior in educational settings, prior juvenile treatment facilities, medical and psychological factors affecting the offender’s judgment; etc.);

- The impact of the crime on the victim (e.g., whether death occurred, serious bodily injury; permanent disfigurement, permanent psychological problems directly caused by the youthful offender's actions, etc); and
- The impact of the juvenile offender's acts upon the community (e.g., whether the community would not be safe if the youthful offender were released before a certain age, term of imprisonment, etc).

The result of this analysis may be that the offender deserves to be treated as an adult and punished accordingly, including, very rarely, life in prison without parole.

Nevertheless, as indicated in our responses to the Committee's Question 47, even juveniles tried as adults do not necessarily serve their sentences in adult prisons. There are multiple confinement and/or treatment considerations for juveniles. At the state level, sentencing varies depending upon respective state law and guidelines, but courts sentencing juvenile offenders still have a number of different options available to them. While it varies by state (in policy and practice), juvenile offenders may, at times, be separated from adult prisoners depending upon the security risk (maximum, medium, minimal) that they pose to others in the prison, the risk of harm to themselves, and the danger that they pose to the community.

As explained in the *Second Periodic Report* and in response to the Committee's written questions, at the federal level, 18 U.S.C. Sections 5031 through 5042 ("The Federal Juvenile Justice and Delinquency Prevention Act," JJDP), require a juvenile who is subject to prosecution in the federal system, and who has not attained his/her 18th birthday, to be placed in a juvenile facility. Title 18 U.S.C. Section 5039 explicitly states:

- "No juvenile committed, whether pursuant to an adjudication of delinquency or conviction for an offense, to the custody of the Attorney General may be placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges."
- "Every juvenile who has been committed shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, counseling, education, training, and medical care including necessary psychiatric, psychological, or other care and treatment."
- "Whenever possible, the Attorney General shall commit a juvenile to a foster home or community-based facility located in or near his home community."

The statutory requirements for handling a juvenile offender's case differently from that of an adult's case, are highlighted further in BOP policy No. 5216.05 (September 1, 1999), which recognizes that "[j]uveniles are a special population with special designation needs." A "juvenile" referred to in this policy is anyone under 21 years old who has been found delinquent

under the JJDPa and anyone under 18 who has been convicted of violating the United States Code.

Placement alternatives vary, and each facility must provide the appropriate level of programming and security for a juvenile offender. The following factors are considered when making a placement:

- o Age of the offender;
- o Offense behavior (including whether violence or weapons were involved in the offense);
- o Length of commitment;
- o Prior record of the offender;
- o Adjustment during prior commitments;
- o Mental and physical health;
- o Special needs;
- o Central inmate monitoring assignments; and
- o The safety of the community.

Depending upon the offense committed, and consideration of the other factors already outlined, BOP utilizes the following placement guidelines:

- Where Offender is Less than 18 years of Age – The juvenile offender is to be committed, when possible, to state contracted agencies which provide services for
 - o Foster Homes – which are state licensed, may house 1-2 delinquents, but no more than 2 in a family home, where there may also be natural or adopted children living with a married couple or a single parent. Non-secure Community- Based Facilities – Not surrounded by a security fence, located in or near the home community; no adult offenders are housed in the facility unless the Court orders the juvenile housed in a Community Corrections Center as a condition of probation.
 - o Secure facilities (surrounded by perimeter fence and offenders do not have access to the community) where no regular contact with adults; the offenders may have regular contact with other youthful offenders serving state-imposed adult sentences
- Where Offender is Over 18 but Less than 21 years of Age – Confinement shall be as follows:
 - (1) For a juvenile offender sentenced as an adult (per 18 U.S.C. Section 5032), to an adult correctional institution operated by the Bureau of Prisons or under contract with the Bureau of Prisons.

(2) For a juvenile offender who has no federal adult sentences and is found delinquent (thereby keeping the offender in the juvenile system), placement is made in accordance with policy stated above for persons under 18;

(3) If all concurrent federal adult sentences are less than the juvenile sentence (just imposed) then the offender is treated as a juvenile for institution designation (i.e., in a juvenile facility);

(4) If any concurrent federal adult sentence is equal to or greater than the juvenile commitment, the adult sentence takes precedence for designation of an institution, and the FBOP must notify the court (which imposed the juvenile sentence) that the federal adult sentence must take precedence for institutional designation; and

(5) If there is a consecutive federal adult sentence to start when the juvenile sentence that the offender is still completing, the offender continues to be treated as a juvenile for institutional designation, and when that sentence expires, he/she is re-designated for commitment to an adult facility consistent with applicable federal law and policy.

- Change in Placement – When a juvenile sentenced as an adult attains his or her 18th birthday or a juvenile sentenced as a juvenile attains his/her 21st birthday:
 - A correctional institution operated by or under contract with the Bureau of Prisons may be designated, treating that juvenile as an adult; or,
 - The juvenile may remain in a contract juvenile facility for continuity of program participation.
- Juveniles with Mental Disease or Defect – When a juvenile is found to have a mental disease or defect under 18 U.S.C. Sections 4253 through 4246 (i.e., found not-guilty by reason of insanity; convicted but awaiting
- sentencing; serving a sentence but needing hospitalization; or due for release but in need of mental health hospitalization), he/she is held in a suitable facility until after his/her 18th birthday.
 - Suitable facilities may include juvenile facilities; mental health facilities; and/or hospitals;
 - The juvenile offender does not have contact with pre-trial or sentenced adults; and,
 - After his/her 18th birthday, the offender's case is reviewed every 6 months by a Medical Designator to assess the continued handling of this offender's case.

7. Does CRIPA apply to privately operated detention facilities?

CRIPA applies to facilities which are owned, operated, or managed by, or provide services on behalf of any State or political subdivision of a State. CRIPA would not apply to privately operated detention facilities unless they are operated/providing services on behalf of a State or political subdivision of a State.

8. Is there protection at the federal level for whistleblowers in the Intelligence Community?

Yes. The Intelligence Community Whistleblower Protection Act of 1998, Pub. L. 105-272, Title VII, 112 Stat. 2413 (1998), provides the intelligence community a limited right to raise urgent and serious concerns to Congress or to the appropriate Inspector General. This statute provides a voice to employees in agencies known for the conduct of intelligence activities where the more general, government-wide protections of the Whistleblower Protection Act are not necessarily applicable.

9. Is there a way to know how effective CRIPA and other domestic protections for prisoners are?

Since the statute was passed in 1980, the Department of Justice has investigated conditions in over 420 nursing homes, mental health facilities, centers for persons with developmental disabilities, residential schools for children with disabilities, jails, prisons, and juvenile justice facilities. Through our CRIPA work we have identified, investigated and worked to ensure reform of various patterns and practices of constitutional violations.

With regard to the Prison Rape Elimination Act, discussed in greater detail in the *Second Periodic Report* and in the written responses to the Committee's questions, State and local compliance is encouraged through grants to detect, prevent, reduce and punish prison rape. A study of federal, state and local prisons and other detention centers is underway and will reveal how successful State and local compliance has been.

Note to Dr. Sveaass regarding Hurricane Katrina:

Although it was not formulated as a question, the United States delegation appreciated Dr. Sveaass's statement of concern for the victims of Hurricane Katrina. It welcomes the opportunity to provide information to Dr. Sveaass about this tragic event and the follow-up by the United States Government to assist its victims. The United States has already provided much of this information, in another form, to Walter Kalin, the UN Special Representative on the human rights of internally displaced persons.

Hurricane Katrina, a Category Four hurricane, was the most destructive and costliest natural disaster in the history of the United States. It resulted in the largest evacuation in U.S. history with half-a-million people displaced. It caused an estimated \$80 billion in damage over 90,000 square miles (23,000km²), an area almost as large as the United Kingdom. The official death of 1,333 people is the third highest death toll from a natural disaster in U.S. history. Hurricane Katrina's record storm surges led to flooding in New Orleans, a city of about 490,000 residents. Record storm surges devastated the Mississippi Gulf Coast as well as parts of the states of Mississippi and Alabama.

The magnitude of destruction resulting from Hurricane Katrina strained and initially overwhelmed federal, state and local capabilities as never before during a domestic incident within our country. President Bush has acknowledged that the initial federal response to Hurricane Katrina was unacceptable. President Bush went on to say, "This government will learn the lessons of Hurricane Katrina." We're going to review every action and make necessary changes, so that we are better prepared for any challenge of nature, or act of evil men, that could threaten our people."

Unfortunately, the immensity of the tragedy was further complicated by false reports from the media of rapes, murders and other acts of criminality in the Superdome and Convention Center. These claims proved to be unfounded and unsubstantiated. Local law enforcement reported that they entered the Convention Center on several occasions after Hurricane Katrina and they never saw any of the criminal acts reported in the media. Military, law enforcement, civilian and medical officials in the affected areas have since reported that media reports about the crimes committed in the Superdome, the Convention Center and in New Orleans after Hurricane Katrina have turned out to be false. State and federal authorities have also confirmed that although one man accidentally shot himself in the Superdome, not a single person was killed inside the Superdome or at the Convention Center after Hurricane Katrina.

Reports about hundreds of dead bodies in the Superdome and Convention Center and tens of thousands of deaths in the affected areas were incorrect and untrue. The official death toll now stands at 1,333, which is far too many deaths, but still many fewer than the tens of thousands of deaths had the federal government not performed countless rescue missions. On September 6, a Federal Emergency Management Agency (FEMA) doctor who had remained in the Superdome until it was fully evacuated released only six bodies to the Louisiana National Guard. Of these six deceased, four died of natural causes, one died of a drug overdose and one died in an apparent suicide. At the Convention Center, four bodies were discovered--contrary to media reporting that there were piles of bodies inside the building--and only one of these deaths may have been the result of a murder according to health and law enforcement officials.

Although the initial days of the local, state and federal response to Katrina's devastation did not meet the high standard that Americans and the international community have come to expect, the federal government has made a concerted effort to remedy any mistakes. Less than three weeks after the hurricane, the President and Congress approved \$61 billion in emergency funding to support Hurricane Katrina Disaster relief efforts. Just 100 days after the hurricane, more than 35

federal departments and agencies were providing assistance to Katrina's victims. More than 14,000 federal personnel were in the affected areas helping state and local officials with the recovery effort. These efforts will continue on behalf of all of Katrina's victims.

We hope that this general overview about Hurricane Katrina will be of interest to Dr. Sveaass. In connection with questions recently received from the Human Rights Committee, the United States is preparing information regarding the evacuation of prisoners during the hurricane. The United States will be pleased to make available this response to the Committee Against Torture at the time it is completed.